No. 2966

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BADER GOLD MINING COMPANY
(a corporation),
Appellant,

vs.

ORO ELECTRIC CORPORATION
(a corporation),
Appellee.

BRIEF FOR APPELLANT.

R. H. CROSS,
ARTHUR H. BRANDT,
Attorneys for Appellant.

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Statement of Case.

(References are to pages of printed transcript.)

This was an action brought by the complainant and appellee, Oro Electric Corporation, against the defendant and appellant Bader Gold Mining Company, for the purpose of quieting the title of plaintiff to a certain water ditch in Butte County, State of California, known as the "Nickerson Ditch", and for the purpose of procuring an injunction restraining and enjoining the defendant from taking any water out of that ditch. The bill of complaint, in

substance, alleges that the complainant is engaged in the business of generating and producing by water power or other means, electric current for light, heat and power, and of transmitting, distributing, selling, and supplying power to the public; that it owns and possesses a certain water ditch in the County of Butte, State of California, known as the "Nickerson Ditch", which is described as extending in a general southerly and southwesterly direction from its intake at Little Butte Creek in the northeast quarter of Section 36, Township 23 North, Range 3 East, M. D. B. & M., through Sections 1, 2, 11, 12 and 13, in Township 22 North, Range 3 East, and Sections 18, 19 and 30 in Township 22 North, Range 4 East, M. D. B. & M., the Kunkle Reservoir in Section 3, Township 22 North, Range 4 East, M. D. B. & M; that the complainant uses the ditch during the summer season for the purpose of distributing water to its customers for irrigation, and during the other seasons of the year for the purpose of conveying water to the Kunkle Reservoir, for use in operating its power plants. It is then alleged that the defendant asserts some claim in that portion of the ditch situated in Section 36, Township 23 North, Range 3 East, and Sections 1 and 2, Township 22 North, Range 3 East; that it claims the right to enter upon the ditch and take water therefrom without making compensation to the complainant; that at divers times designated in the complaint during the year 1912 it did forcibly enter upon and open the ditch

at a point in the southeast quarter of the northwest quarter of Section 1, Township 22 North, and injured the banks thereof and took large quantities of water therefrom, without making or tendering any compensation. It is asserted that the claims of defendant are without right or foundation; that as a result of its acts, the operation of complainant's power plants has been interfered with, and that defendant threatens to continue to assert its claims and to enter upon and interfere with the ditch and take water therefrom. By the prayer it is asked that the claims of the defendant be held invalid and without right; that it be decreed the defendant has no estate, right, title or interest in and to the ditch and no right to take water therefrom; that complainant is the owner of the ditch and that the defendant be forever restrained and enjoined from asserting any claim thereto or any estate or interest therein, or from entering upon or in any way from interfering with the ditch or taking water therefrom.

In its answer defendant admitted that it asserted a claim in that portion of the Nickerson Ditch situated in Section 36, Township 23 North, Range 3 East, and in Section 1, Township 22 North, Range 3 East, but denied that it asserted any claim to any portion of the ditch in Section 2. It admitted that it claimed the right to enter upon the ditch and take water therefrom without making compensation to the complainant and admitted that it took large quantities of water from the ditch but denied that

it injured the banks, or that the taking of the water was without right or foundation, or otherwise wrongful. It further alleged that it was without knowledge of the facts concerning its ownership and possession of the Nickerson Ditch alleged by complainant.

By way of affirmative defense, the defendant alleged that ever since the 17th day of March, 1899, it had been the owner of the right to use and in possession of the use of 500 miners' inches of water flowing in Little Butte Creek to be diverted therefrom at a point commonly known as "The Old Thompson Flat or Delaplain Ditch head-dam" on Section 36, Township 23 North, Range 3 East, and conducted therefrom through a flume and ditch in a southerly direction across a portion of Section 36, and across a portion of Section 1, Township 22 North, Range 3 East, to the place of use at defendant's mine located on the northeast quarter of Section 1; that defendant during all times since the 17th day of March, 1899, had used 500 miners' inches of water in its business of mining at said mine, and except as thereafter alleged, had conducted the water through its flume and ditch; that defendant's ditch headed on Little Butte Creek below the head of the Nickerson Ditch as described in plaintiff's bill of complaint; that plaintiff since on or about the year 1888, had been by itself and its predecessors in interest, according to the information and belief of defendant, in the possession and in the enjoyment of an easement to maintain

the Nickerson Ditch across the lands of the defendant and other owners of adjoining land; that said Nickerson Ditch was built and maintained for the purpose of taking from Little Butte Creek water emptied therein above the head of the Nickerson Ditch by the Snow Water Ditch, which latter ditch conducted water to Little Butte Creek from a source without the watershed of that creek. It was then alleged that during the summer of 1906 complainant enlarged its ditch at the head thereof and did unlawfully and without right divert all the water from Little Butte Creek so that no water flowed therein to the head of defendant's ditch, thereby depriving defendant of the use of 500 inches of water owned by it; that immediately and thereupon defendant recaptured its water flowing in the Nickerson Ditch by opening a gateway therein and letting run therefrom water only sufficient for its use, not to exceed in quantity 500 miners' inches; and that it has continued to do so from the year 1906 to the time of the commencement of the action.

As a further affirmative defense, defendant alleged that it had at no time used the Nickerson Ditch for any purpose inconsistent with the enjoyment and use of any easement right possessed by the complainant across the lands of the defendant.

As further defenses the defendant alleged that complainant's cause of action was barred by the Statute of Limitations; that complainant had been

guilty of laches in that it had not brought its action within a reasonable time after the commencement of the acts of the defendant complained of, and further, that the defendant had been in the quiet, open and continuous possession of the right to conduct through the Nickerson Ditch 500 miners' inches of water to the use of which defendant was entitled, and to take the same from the ditch at a point near defendant's mine, holding and claiming said right adversely to all other persons under a claim of a legal right so to do for more than five years before the commencement of the action. This claim of prescriptive right was also set up by way of cross-complaint.

After the issues were formed the cause was referred to the Standing Master in Chancery with directions to take and report the testimony together with the Master's findings and conclusions thereon (18). After a trial of the issues before the Master he prepared a draft report of his findings and conclusions, and, pursuant to the usual custom, gave the parties a definite time within which to object to any portions of that report. After the filing of objections by defendant to said draft report (66-102), the Master prepared his final report and filed it with the court. In this report he found and determined that complainant was entitled to the relief prayed for (21-66). By stipulation the objections and exceptions theretofore taken by defendant to the draft report of the Master stood as the exceptions taken to his final

report (102-104). The trial court overruled all of the exceptions and on the 24th day of May, 1915, entered a judgment finding and determining that defendant had no right, title or interest in or to the Nickerson Ditch, and ordered that a perpetual injunction issue forever enjoining and restraining it from making any claim thereto or from taking any water therefrom without making or tendering compensation to the complainant therefor. It is from this judgment that the present appeal is prosecuted.

Statement of Facts.

It is proper that a brief statement of the salient facts developed at the trial should be made, to the end that the court may become acquainted with the situation as disclosed by the evidence. While a great many of the facts are without controversy, a considerable number were in issue. The statement which follows, therefore, is in some measure controversial, though it is our purpose to make it as fair as possible, stating the respective contentions of the parties on the disputed facts, and briefly commenting on them.

The Bader Gold Mining Company, the defendant and appellant, is the owner of the northwest quarter and of a portion of the northeast quarter and southeast quarter of Section 1, Township 22 North, Range 3 East, M. D. B. & M. situated in Butte County, California. On this property it has for

many years operated and is now operating a placer gold mine. In conducting operations at this mine it has at all times been necessary and now is necessary to use water in varying quantities. To the west of the mine there extends through defendant's property in a general northerly and southerly direction a stream of considerable size known as Little Butte Creek. This stream has its source in the mountains several miles to the north and then flows in a general southerly direction through the lands of defendant and others to the Feather River. To the east of the mine (viz., on the opposite side of the mine to the creek) there also extends through defendant's property in a general northerly and southerly direction, a water ditch commonly known as the "Nickerson Ditch". This ditch extends from its intake on Little Butte Creek about a mile north of defendant's property, thence through the land of defendant and others to the Kunkle Reservoir, its general course being that indicated by complainant in its bill. Below the head-dam of the Nickerson Ditch there is another ditch known variously as the "Walker & Wilson Ditch", "West Ditch", "Powers Ditch" or the "Old Thompson Flat Ditch". This ditch has its intake in Section 36, immediately north of the property of defendant, thence runs through the property of defendant and others to a point several miles below where it joins with the Nickerson Ditch. South of the intake of the Powers Ditch (which term will be hereafter used to designate the ditch just mentioned)

there is a third ditch which extends from its intake at Little Butte Creek to the Mineral Slide Mine situated a mile or two east of the creek. This ditch does not touch the lands of defendant. Above the intakes of all of these ditches, and several miles above the lands of defendant, there was a further ditch known as the "Snow Ditch". This ditch extended from the west branch of the Feather River at a point nearly opposite the Village of Inskip, and thence ran in a general southwesterly direction for about eight miles to Little Butte Creek. All of the foregoing ditches are involved in one way or another in the present controversy.

It appears from the evidence that some time prior to the year 1888 one A. A. Nickerson was interested as the owner or one of the chief owners of the Mineral Slide Mine. This mine was a placer mine and was operated by water taken from Little Butte Creek through the Mineral Slide Ditch heretofore referred to. The water taken through this ditch and used at the Mineral Slide Mine, however, was not the natural water of Little Butte Creek, but was water which was emptied into Little Butte Creek from the west branch of the Feather River, outside of its watershed, by the Snow Ditch. At this time, apparently, Nickerson claimed no interest in the natural flow of Little Butte Creek as distinguished from the artificial flow caused by the water of the Snow Ditch. It appears to have been the custom to measure the waters from the Snow Ditch as they flowed in Little Butte Creek

past the head dam of the Powers Ditch. The proprietors of this latter ditch seemingly claimed a first right to the natural waters of Little Butte Creek, a claim which was evidently recognized or acquiesced in by Nickerson.

In the year 1888 Nickerson acquired an old abandoned ditch right known as the "Delaplain" Ditch which was substantially located upon the present course of the Nickerson Ditch. On this line he built a new ditch thereafter to be known as the "Nickerson Ditch", and being the ditch here in controversy. It appears that in acquiring Delaplain's rights and building a new ditch, it was his purpose to carry any surplus of water from the Snow Ditch which he did not need at the Mineral Slide Mine to the farming region below for irrigation, his plan including the subdivision and sale of farming land, with water rights from the Nickerson Ditch. He retained the title of the ditch from the time it was built until 1890, during which time, in recognition of the rights of the owners of the Powers Ditch, he permitted the natural water of Little Butte Creek to flow past his head dam, retaining and diverting only the Snow Ditch water. (The early history and use of the Nickerson Ditch will be found in the testimony of D. B. North, 127-134, 289-294.)

In July, 1890, Nickerson conveyed the Nickerson and Snow Ditches to one Frank McLaughlin (359). McLaughlin retained title until October 4th, 1897, when he conveyed the ditches and water rights to

Walter Cutting (360). On April 30th, 1898, Cutting conveyed the Nickerson and Snow Ditches and the water rights to the Oroville Water Company (362). They were transferred from the Oroville Water Company to the Oro Water, Light & Power Company on August 15th, 1905 (364), and by the latter company to the complainant, Oro Electric Corporation, on March 12th, 1912 (367). The Nickerson and Snow Ditches and the water rights connected therewith were described by Nickerson in his deed to McLaughlin, by McLaughlin in his deed to Cutting, and by Cutting in his deed to Oroville Water Company, as follows:

> "That certain ditch and water right taken from the west branch of the Feather River at a point nearly opposite the village of Inskip and about five miles above Powell's said ditch running thence in a southwesterly direction for about 8 miles to its terminus at or near Hasty's mill; said ditch conducting the water by ditch and flume on top of and across the Dog-town Ridge; said ditch being commonly and generally known as the Snow ditch, also all additions to said ditch made by the party of the first part or his grantors to convey the waters thereof to or near Paradise, and all rights which the party of the first part has or may have obtained under a certain deed dated the 14th day of March, 1888, from Charles Delaplain to the party of the first part, recorded in Volume 30 of Deeds, page 36, Butte County Records. Also by a certain deed from the Magalia Consolidated Mining Company to A. A. Nickerson recorded in Book 30 of Deeds, Butte County Records, page 30, so far as the same appertain to said water rights, together with all appurtenances, rights of way,

additions, extensions, head dams, flumes and improvements on said ditch or any part thereof."

In the deed of the Oroville Water Company to Oro Water, Light & Power Company, the ditches and water rights are described as follows:

"Also all the right, title, claim and interest which the said party of the first part now has or may hereafter acquire in and to that certain property known as the Hendricks Ditch; Also all the right, title, claim and interest which the said party of the first part may now have or may hereafter acquire in and to that certain property known as the Snow Ditch and Nickerson Ditch and described in that certain deed from A. A. Nickerson to Frank McLaughlin, recorded in Book 33 of Deeds, page 397, Records of Butte County; Also all that certain ditch and water right known as the Nickerson Ditch conveying water from Little Butte Creek near the town of Magalia to the town of Paradise in said County of Butte; Also all right, title and interest which the party of the first part now has or may hereafter acquire to that certain water ditch in Kimshew, Oregon and Hamilton Townships, County aforesaid, formerly known as the Walker and Wilson Ditch, and now known as the West Ditch."

In the deed from Oro Water, Light & Power Company to the Oro Electric Corporation, the complainant, the ditches and water rights are described as follows:

"Also that certain water right and dam known as the Nickerson head dam whereby water is taken from Little Butte Creek near the Town of Magalia in Section 36, Township 23, N.,

R. 3 E., M. D. M., in Butte County California; and the conduit conducting said water thence to Kunkle Reservoir in Section 31, Township 22 N., R. 3 E., M. D. M., in Butte County, California; and the conduit conducting said water thence to Kunkle Reservoir in Section 31, Township 22 N., R. 4 E., M. D. M., in Butte County, California.

"Also all and singular the plants, electric works, water, power works, power houses or other stations or buildings for the generation, transmission, or storage of power or electrity, and the fixtures, fittings and equipment thereof, including all dynamos, engines, boilers, machinery, regulators, meters, convertors, switchboards, shafting, belting and other appliances, and all lines, mains, feeders, poles, mast arms, brackets, cables, wires, insulators, lamps, lamp sockets, house wiring connections, and electric fixtures of every kind and nature whatsoever."

The Powers Ditch, which it has just been said, claimed the first right to the natural waters of Little Butte Creek, seems to have been built in the early 70's for hydraulic mining purposes, some water also being supplied to the town of Thompson Flat near Oroville. Hydraulic mining having been stopped, it seems that the ditch was used for some years to supply a colony known as Thermalito Colony. The learned Master, in his report, states that this ditch was used for this latter purpose until 1898. If his statement refers to the full length of the ditch it evidently was an inadvertence, for it is without controversy that the upper portion of the ditch was abandoned and in decay as late as 1890.

The evidence introduced as to the history and user of the "Powers Ditch" from its construction in the early 70's to the year 1890, is very meager and vague. It consisted largely of the recollection of two witnesses,—Milton J. Green (300-302) and A. W. Fogg (310-314). The former at no time ever had any interest in the waters or ditches on Little Butte Creek, and simply testified as to his recollection as a then member of the community. Mr. Fogg, an elderly gentleman, referred to its use only generally. The important thing concerning the ditch is that the proprietors used the natural waters of Little Butte Creek as distinguished from the waters emptied into the creek by the Snow Ditch, a right which, whatever may have been its validity or extent, seems to have been acquiesced in at least by Nickerson.

The record title to the Powers Ditch is set out at pages 304 to 310 of the record, and, summarized, is as follows:

January 31st, 1876, West to Powers and others.

June 23d, 1883, commissioner's deed to Jenkin Morgan.

June 11th, 1887, Morgan to A. F. Jones, 1-8.

July 12th, 1887, Morgan to A. F. Jones, 1-32.

September 15th, 1887, Morgan to A. F. Jones, 1-10.

September 2d, 1890, Morgan to A. F. Jones, 26, 100.

May 20th, 1898, Morgan to A. F. Jones, 147-800.

May 20th, 1898, Morgan to A. F. Jones, 3-10.

October 9th, *1897,* A. F. Jones and Thermalito Colony Company to Walter Cutting.

May 25th, 1898, Jones and wife to Oroville Water Company.

August 15th, 1905, Oroville Water Company to Oro, Water, Light & Power Company.

This ditch or water right does not seem to have been included in the conveyance of the Oro Water, Light & Power Company to Oro Electric Corporation, the complainant (Exhibit 9, page 367). The description used in the conveyances was as follows:

> "That certain water ditch situate, lying and being in Kimshew, Oregon and Hamilton Townships, County of Butte, and State of California, formerly known as Walker & Wilson Ditch and now known as the West Ditch, commencing at a dam on Little Butte Creek about one-quarter of a mile below Neal's sawmill and thence running along and down the banks of said creek; thence over the divide between Little Butte Creek and Dry Creek; thence along and down said Dry Creek; thence over the mountain to Saint Clairs Flat; thence along the foot of Table Mountain to Thompson Flat, together with all flumes, reservoirs, lateral and side ditches, water, office and buildings, and all appurtenances thereto belonging or in any wise appertaining."

It will be noted from the summary supra that no conveyance appears from Walter Cutting to the Oroville Water Company or to A. F. Jones. At the time that Jones conveyed to the Oroville Water Company in May, 1898, he had already

transferred his interest in the ditch to Cutting, and accordingly, at that time he had no interest which he could convey to the Oroville Water Company. It is to be also noted at this point that the evidence disclosed no record of any appropriation of the waters of Little Butte Creek to be diverted through this ditch, and that there was no evidence of the amount of water diverted and used through the ditch during the period of its user, other than that it took all of the water of the creek in the "low" or "dry" season (D. B. North, 290).

In 1892, George B. Mowry, the predecessor in interest of defendant and appellant, purchased the mining properties now owned by defendant. He immediately started mining operations at the place on the property where present operations are carried on. When he secured the property and went into possession thereof, the upper portion of the Powers Ditch was in ruin and evidently had been abandoned for some time. At that time the record shows that McLaughlin was the owner of the Nickerson and Snow Ditches. Just what use McLaughlin was making of these ditches at that time does not appear from the testimony. Whatever the use, however, it could not have been of much importance or to a great extent, for he permitted Mr. Mowry from the year 1892 to the year 1897, to take what water he need for the operation of his mine out of the ditch. This same arrangement seems to have been continued from 1897 to 1899, while the record title of the Nickerson Ditch

was in Cutting. The learned Master, in his report, states that during this period Mr. Mowry used the water from the Nickerson Ditch only in the winter, the water in summer going to the farmers below. With all due deference to the learned Master, we can find no evidence in the record that shows that Mowry's use of the water was confined to that season of the year. McLaughlin's user, as we have said, does not appear from the record.

In 1899 Mr. Mowry filed a notice of appropriation of 500 miners' inches of water of Little Butte Creek to be diverted at the head-dam of the old Powers Ditch and to be used at his mine (135). He thereupon constructed a new ditch following the lines of the upper portion of the old Powers Ditch, and brought water from Little Butte Creek to his mine. He testified that he made this appropriation at the suggestion of McLaughlin, who called his attention to the fact that the proprietors of the Nickerson Ditch had no right to the natural waters of Little Butte Creek, but only to such waters thereof as had been discharged therein from the Snow Ditch from the west branch of the Feather River (139). The Master suggests that inasmuch as at this time McLaughlin had transferred his rights in the Nickerson and Snow Ditches to Cutting such a statement, even if made, cannot be accepted as evidence of the fact that the then owners of the Nickerson Ditch claimed no right to the natural waters of Little Butte Creek. This, perhaps, is true but it at least shows that during

the time McLaughlin owned the ditch, 1892 to 1897, no such claim was made by him. The witness W. S. Hendrix testified that Mr. Mowry told him that he was going to build his dam to get some winter water and thus save buying water (250), which version the Master is inclined to think is much more consonant with what appears to be the fact. It is possible that both reasons may have actuated Mr. Mowry. He had been securing water from the Nickerson Ditch up to that time as he needed it with the acquiescence of the owners. Cutting, however, had transfered the Nickerson and Snow Ditches to the Oroville Water Company and it was hardly to be anticipated that he would be permitted to take water from the Nickerson Ditch longer without paying compensation for it. Under these circumstances the obvious thing to do, if the natural waters of Little Butte Creek were available, was to appropriate them for use at his mine. There does not appear to have been any controversy at this time between any of the predecessors in interest of the parties and it hardly seems reasonable that Mr. Mowry would have appropriated the water and expended some $5000.00 (135, 136) in reconstructing the upper portion of the old Powers Ditch if there had been any question about the relative water rights in Little Butte Creek.

Mr. Mowry used the reconstructed Powers Ditch to bring water to his mine until the month of December, 1900, when a slide occurred and put his ditch out of commission. About the same time

the defendant company was organized, and Mr. Mowry's rights in the property and the water were conveyed to it, Mr. Mowry thereafter acting as manager and superintendent of defendant company. The ditch was repaired and between that date and the end of the year 1904 defendant company used water both out of it and out of the Nickerson Ditch (136, 141, 142). During this period the defendant was engaged in ground sluicing and hydraulicking using all the way from 1000 to 1200 inches of water (C. M. Hendrix, 268, 276; W. C. Bader, 336, 337). Defendant's own ditch would not carry more than the 500 inches appropriated, and the nature of the work at the mine required in addition water from the Nickerson Ditch and the greater head there available. Mr. Mowry testified that during this period he arranged with the Oroville Water Company for the use of the Nickerson Ditch to carry the waters from Little Butte Creek, paying therefor a flat rate at first of $50.00 per month, and afterwards of $75.00 per month, and also assuming the maintenance and care of the ditch from its head-dam to defendant's property. Complainant contended that the arrangement made was not for the use of the ditch, but was for the purchase of water,—a contention which the learned Master is inclined to believe was the fact. But the question whether he bought the water or rented the ditch is immaterial, since defendant required from the nature of its operations much more than the capacity of its own

ditch or the amount which it had appropriated. Under these circumstances, even if the defendant company bought the additional water needed from the Oroville Water Company, it was no recognition of that company's right to any of the water of Little Butte Creek which had been appropriated by Mr. Mowry in 1899. The last payment made by the defendant company for water from the Nickerson Ditch was in September, 1905, and was made for the use of water in the winter of 1904 (William Durbrow, 298, 299). From the end of 1904 to the summer or fall of 1906 defendant's requirements were satisfied with the water that it brought in its own ditch.

This was the general situation in the year 1906. The complainant contended that in that year the Oroville Water Company, its predecessor in interest, was not only the owner of the Snow Ditch water which emptied into Little Butte Creek from the west branch of the Feather River, but that it had succeeded to the appropriative rights of the original owners of the Powers Ditch in the natural waters of Little Butte Creek. The extent of this right it did not attempt to define other than to contend that it extended to the full flow of the stream in the "summer time", a statement which at the best, is very indefinite and vague as a measure of appropriative rights. This contention could not be based upon any conveyance of the rights which the original proprietors of the Powers Ditch may have had. No claim could be based upon the deed of

Jones to the Oroville Water Company for the reason that the record shows that at the date of that conveyance Jones no longer had any right, title or interest in the ditch or the water rights, having conveyed them to Cutting. To meet this very obvious defect, complainant seized upon several isolated incidents disclosed incidentally in the testimony, and contended that some arrangement evidently had been made in the year 1890 between Jones and McLaughlin, whereby the water that had originally been taken from the Powers Ditch was diverted down the Nickerson Ditch. This conclusion was sought to be arrived at from the fact that the Powers Ditch seems to have been abandoned in 1890, from the testimony of the witness Bickford that in 1890 McLaughlin had started to reconstruct the Powers head-dam but desisted from so doing when he secured the Nickerson Ditch (378) and from the fact that Jones seemed to have been interested with, or the attorney for McLaughlin. It seems to us that it requires some imagination to deduce from evidence of this character that some arrangement was made between Jones and McLaughlin whereby the natural waters of Little Butte Creek, as distinguished from the water emptied therein from the Snow Ditch, was in 1890 diverted into the Nickerson Ditch. The nature of this arrangement or agreement, if any such can possibly be inferred, is left wholly to conjecture. It is singularly strange that if such an arrangement was made that no record of any kind of its

nature or its terms was produced. It seems hardly reasonable that Jones, if he claimed that the Powers Ditch still had appropriative rights to the natural waters of Little Butte Creek, should have permitted McLaughlin, in whom was the title of the Nickerson Ditch, to divert and use them through that ditch without a scrap of writing to protect his rights. Further than this, in 1890 when the arrangement is alleged to have been made, Jones owned only an undivided one-half, substantially, of the Powers Ditch. Morgan, the owner of the other interest, does not seem to have figured in the assumed arrangement. Again, it is strange if the Powers Ditch water right was added to and merged in the Nickerson Ditch water right, that McLaughlin, when he conveyed the latter ditch to Cutting in 1897 (supra), should have made no mention of any right but the Snow Ditch right. On October 4th, 1897, Walter Cutting secured the record title to both the Powers Ditch and the Nickerson Ditch. If the original appropriative rights of the natural water of Little Butte Creek were still vested in the owner of the Powers Ditch, it is singular that when he conveyed to the Oroville Water Company in 1898 he made no mention of them. In the face of such facts as these, it is impossible to infer any such arrangement as was contended for by complainant.

Nor does the fact, if it be a fact, that the Nickerson Ditch took all the water out of Little Butte Creek in the summer time, after 1890, lend any

more probability to such a conclusion.* The word "summertime", which was so frequently used in the questions asked and the responses of the witnesses, is altogether too vague and indefinite as a measure of an appropriative right either in its creation or in its exercise. Apart from this, there is absolutely no evidence that if, as a matter of fact, the Nickerson Ditch did take all the water in Little Butte Creek in the "summer time", it was taken under any claim of right whatever. On the contrary, the action of McLaughlin and Cutting in permitting Mr. Mowry to take such water as he wanted without compensation, is inconsistent with any such claim of right, as is the fact that Mr. Mowry reconstructed the upper portion of the Powers Ditch at a considerable expense in reliance on the fact that the natural waters of Little Butte Creek were open to appropriation. The truth of the matter, we think, is that such a claim was made for the first time by the Oroville Water Company after the year 1905, when the defendant company ceased purchasing water from it and when the greater use for water at Kunkle Reservoir, which was put in effect in 1906, was in contemplation. In the deed from the Oroville Water Company to the Oro Water, Light & Power Company, we find that the Nickerson Ditch for the first time

* Defendant denied that this was a fact. The evidence on this issue, if deemed material, will be found at the following places in the record: Witnesses for complainant, William Durbrow, 188; W. S. Hendrix, 248, 249, 250, 254; C. W. Bader, 237-247; C. M. Hendrix, 266-267; James W. Goodwin, 314; A. A. Davis, 279. Witnesses for defendant, G. B. Mowry, 138, 142, 168, 174; G. B. North, 130; L. Cohn, 161, 163, 164; A. A. McCubbin, 156; A. M. Glover, 339-341; W. C. Bader, 333, 335; S. P. Moody, 125, 126, 127.

in any of the conveyances is described otherwise than as a continuation of the Snow Ditch.

Defendant on the other hand contended that the appropriative right of the proprietors of the Powers Ditch, whatever its origin may have been and whatever its extent, was abandoned as late as 1890, and that it had vested in Mr. Mowry, its predecessor in interest, to the extent of 500 miners' inches by his appropriation in 1899; that neither McLaughlin nor Cutting claimed any right to divert any water out of Little Butte Creek but the water brought in by the Snow Ditch; that in their respective deeds the right conveyed was in express terms limited to such waters; that it appeared from the evidence that the Oroville Water Company, as late as 1901, was engaged in repairing the Snow Ditch (300) and that as late as 1906 water was measured out of the Nickerson Ditch below the head-dam, and returned to the creek in apparent recognition of the rights of others to the natural waters of the creek (E. H. Bickford, 368-382). It further urged that there was no competent evidence whatever to show that the right of the owners of the Powers Ditch to the natural waters of Little Butte Creek was ever transferred to any of the predecessors in interest of the complainant and that, in fact, such water rights were not even referred to in the deed from the Oro Water Light & Power Company to complainant (Exhibit 9, page 367). The defendant, accordingly, claimed that it, as the successor in

interest of Mowry, was in the year 1906 the owner as appropriator of the waters of Little Butte Creek to the extent of 500 miners' inches.

The foregoing is a brief narrative of the salient facts concerning the history of the various ditches up to 1906 and of the respective contentions of the parties with reference to the rights in the natural waters of Little Butte Creek in that year. It is not our purpose to elaborate upon them or to analyze the evidence in further detail. In view of the principle of law which he deemed applicable, the learned Master concluded that a determination of the respective rights of the parties and their predecessors in interest in the waters of Little Butte Creek was wholly immaterial, and expressly declined to find upon that question, suggesting in his report that if the issue was material, the cause would have to be re-referred for further findings (45).

In August, 1905, the Oroville Water Company transferred its properties to the Oro Water, Light & Power Company, including its rights in the Nickerson Ditch and the rights it claimed in the Powers Ditch. The new company planned to collect the waters of the various ditches into the Kunkle Reservoir and use it for the generation of electric power. Accordingly, a survey of new work was made in 1905 and in 1906 the Nickerson Ditch was rehabilitated and reconstructed. Mr. Mowry, the manager and superintendent of defendant company, testified that at this time the Oro Water, Light &

Power Company largely increased the capacity of the ditch through defendant's property, and for the purpose of accommodating the new and greater use, diverted all of the water out of Little Butte Creek and away from defendant's ditch; that as the result thereof, defendant company was wholly deprived of the water flowing in Little Butte Creek and which it had been using through its ditch to operate its mine;* that defendant company thereupon went upon the Nickerson Ditch at a point where it passed over its property, opened the gate which had theretofore been used for taking water out of the Nickerson Ditch while it was being used during the years 1901 to 1904, and took from the ditch water sufficient to operate its mine, not exceeding the amount to which it was entitled under its appropriation, and that it continued to do so from that year until the commencement of this action in 1912.

The learned Master, and the court in overruling the exceptions taken by defendant to the Master's report, held that even were the above facts true, they constituted no defense to the action, and, as on the question as to the respective rights of the parties to water in Little Butte Creek, declined to find on the fact whether the ditch had been enlarged or whether the Oro Water, Light & Power

* The testimony with reference to the enlargement of the Nickerson Ditch and the diversion of water in 1906 will be found at the following portions of the record: Witnesses for defendant, S. P. Moody, 113, 123; A. A. McCubbin, 156-161; W. C. Bader, 338, 339; G. B. Mowry, 137, 138, 143, 166, 167, 170. Witnesses for complainant, William Durbrow, 191-198, 199-201, 209; W. S. Hendrix, 253, 254, 256, 257; C. M. Hendrix, 270, 271; C. W. Bader, 241-247.

Company had diverted water to the use of which defendant was entitled.

The foregoing statement of the general history of the controversy between the parties and of the respective contentions of the parties on the issues, will serve to acquaint the court with the general situation disclosed by the record, and to emphasize what we conceive to be the fundamental error made by the lower court.

Specification of Errors.

The Master's report is quite lengthy (see Trans. pages 21 to 66). To adequately set forth the objections of the defendant to this report it was necessary to take some fifty-six separate exceptions to it. All these exceptions were overruled by the lower court. In order to preserve the points upon which defendant relies it made fifty-five separate assignments of errors (394-411). It is obviously impracticable to attempt a separate discussion of each one of these assignments. Such a course would unduly lengthen this brief and lead to useless repetition. The various assignments of errors can be grouped, however, we think, and discussed under several general specifications.

I.

The court erred in holding as a matter of law and equity that where one possesses an easement

for conducting water across the land of another, which easement is exercised through a designated conduit or ditch, the mere act of the servient owner in taking water out of the conduit is wrongful and a trespass and that it is absolutely immaterial; 1, that the water taken by the servient owner is not water which the other is entitled to carry through the ditch under his easement right; 2, that the water taken by the servient owner is water to the use of which he is entitled as riparian proprietor or appropriator; or 3, that the right of the owner of the easement to the use of the conduit is not exclusive, and that the use by the servient owner is not inconsistent with the enjoyment of the easement.

By adopting and applying this principle the court erred particularly,

A. In holding that complainant made out a prima facie case on the pleadings and admissions, and in requiring defendant to go forward with presentation of proof and justify its acts (Assignment XI (398); Exception I (66) to Master's Report).

B. In holding and concluding that the allegations contained in the first three paragraphs of the second affirmative defense pleaded by defendant did not constitute a defense to the action (Assignments V (396) and XV (399); Exception VI (70) to Master's Report). And in this connection:

1. In failing to find upon the respective rights of complainant and defendant to the waters flowing in Little Butte Creek and in the Nickerson Ditch (Assignments XII (398) and XIX (401); Exceptions II (67) and X (75) to Master's Report).

2. In failing to find upon the issue whether the Nickerson Ditch was enlarged in or about the year 1906 through the land of defendant and whether the complainant at said time diverted water from Little Butte Creek to the use of which defendant either as riparian owner or as appropriator, was entitled (Assignments XVII (400) and XVIII (401); Exceptions VIII (75) and IX (75) to Master's Report).

3. In ruling out, rejecting and excluding the offered testimony of the witness, B. L. McCoy, which said offered testimony was in substance as follows: That said witness had made a survey of the Nickerson Ditch in 1905 and 1906 for the predecessors in interest of the complainant company, and that said ditch was enlarged and its capacity largely increased (Assignment XXIX (403); Exception XXXV (96) to Master's Report).

C. In holding and concluding that the allegations contained in the third affirmative defense set out in the answer of defendant

did not constitute a defense to said action (Assignments VI (396) and XVI (399); Exception VII (73) to Master's Report).

D. In failing to define or describe in its judgment and decree the extent and character of the easement right of complainant across the lands of the defendant, which right was by said decree quieted as against the defendant (Assignments XXXV (405) and XXXVI (406); Exception XLV (101) to Master's Report).

II.

The court erred in finding and concluding that defendant's claim to a prescriptive right to use that portion of the Nickerson Ditch extending through its land for the carriage of water, to the use of which it was entitled, or to take water from said ditch, was not sustained by the evidence (Assignments VIII (397) and XXXII (404); Exception XLI (99) to Master's Report).

In particular in finding and determining that defendant had failed to prove the allegations of its sixth affirmative defense, the court erred:

A. In finding that defendant company from 1906 to 1909 used the water from the Nickerson Ditch only occasionally, and not in such a manner as to raise a foundation for prescription (Assignment XXI (401); Exception XXIV (87) to Master's Report).

B. In finding and holding that the water that was taken by defendant in the Nickerson Ditch in the years intervening between 1906 and 1909 was taken without complainant's knowledge and surreptitiously, and that there was no open use by the defendant of the ditch until 1909 (Assignments XXII (402) and XXIII (402); Exceptions XXV (88) and XXVI (90) to Master's Report).

C. In finding and holding that defendant's use of the Nickerson Ditch and of the water through the spillway on its property was several times interrupted by complainant (Assignments XXIV and XXV (402); Exceptions XXX (93), XXXI (94) to Master's Report).

D. In ruling out, excluding and rejecting the offered testimony of the witness, William J. Newman, which testimony was in substance as follows: That the witness had been at the Bader Mine for a week at a time off and on since the year 1903, his visits being made both in the summer and winter; that since the year 1906 the Bader Gold Mining Company had been getting its water out of the Nickerson Ditch; that on these visits in coming and going from Magalia to the mine he quite often passed near the Bader spillway of the Nickerson Ditch, and that on the occasion of every visit made by him he had seen the gateway open and the water running down to the mine

(Assignment XXX (404); Exception XXXVI (96) to Master's Report).

III.

The court erred in holding and concluding that complainant was not guilty of laches, or inequitable conduct (Assignments IX (397), X (398), XXVII (403), XXVIII (403); Exceptions XXXIII (95) and XXXIV (96) to Master's Report).

We will discuss the foregoing points in the order presented.

I.

THE LEGAL PRINCIPLE ADOPTED BY THE COURT AND APPLIED BY IT IN THE CONDUCT AND IN THE FINAL DETERMINATION OF THE CAUSE IS ERRONEOUS.

The act of defendant which complainant charged was wrongful, viz.: the taking of water out of the Nickerson Ditch, was committed by defendant upon its own property. This is not a case of an act done by a total stranger under no claim of right whatever, but it is the act of an owner done upon his own land, and one which under ordinary circumstances would constitute a mere exercise of the dominion accruing to it by reason of its ownership. This basic fact is to be constantly borne in mind in testing the conclusions of the lower court with reference to the law applicable to the controversy.

At the outset one is confronted with the question as to just what claim or right the complainant invoked the aid of court to protect. In its complaint it alleged that it was the owner and in the possession of the "Nickerson Ditch" and it seeks to have its title to this "ditch" quieted; to have it determined that the defendant has no estate, right, title or interest in and to said "ditch" or any right to take water from said "ditch", and to enjoin defendant from asserting any claim to said "ditch".

The word "ditch" ordinarily, and in legal parlance, may mean one of two things: It may mean the right of way for water, or it may mean simply the conduit or physical means through which the water is conducted. Not only is this so, but the right to the water or the right of way for the water is separate and distinct from the right to the physical conduit. The respective rights are capable of separate and distinct injuries giving rise to separate and distinct actions for which there are separate and distinct remedies.

> "They are each capable of separate and distinct injuries giving rise to separate and distinct causes of action for which there are separate and distinct remedies."
>
> Kinney on Irrigation and Water Rights, 2nd Ed., Vol. 2, pages 320, 321.

> "They (the dam and ditch) are land and for the purposes required must necessarily be connected and continuous, and part and parcel of one entire and complete, fixed and immov-

able thing. When trespassed upon, or taken from the possession of the plaintiff, and withheld as a whole, by one act, we do not see why the act should not constitute one cause of action, as much so as the taking possession and wrongfully withholding of an entire continuous tract of one hundred acres of land. But the water right, when acquired, although intimately related to and connected with the site for a dam and canal, and dam and canal commenced, etc., is a different thing, even though each may be necessary to make the other available or useful. They are capable of several and distinct injuries, giving rise to separate and distinct causes of action, for which there are separate and distinct remedies. The dam and canal may be trespassed upon, broken down, destroyed or taken into possession under a claim of right, without taking away the water, or preventing its use in any other mode or place, or without questioning plaintiff's right to it, and plaintiff may have its action for the trespass, or to recover the possession of the land constituting the dam and canal, or their site; and the water may, also, be diverted and taken away without in any way disturbing or interfering with the dam and canal."

Nev. Co. & Sacramento Canal Co. v. G. W. Kidd, 37 Cal. 282, at page 309.

While there is an allegation in the bill that defendant injured the banks of the ditch, which suggests a violation of a right to the physical conduit, it is clear from all the allegations of the bill that the word "ditch" is employed in its primary meaning as a right of way or easement for conducting water across the land of another. This is the legal sense in which the word "ditch" is generally employed.

> "In plaintiff's plea of former judgment the allegation is that it had been adjudicated that she was the owner of a 'ditch and waterway' across the lands of defendant for the purpose of conveying waters. In the foregoing discussion we have treated this allegation as meaning no more than that she owned an easement or right to carry water over his lands through a ditch or waterway, and such, we think, is the proper construction of the language quoted."
>
> Hoyt v. Hart, 149 Cal. 722, 730.

This also is the view taken by the learned Master (35).

Assuming then that the right sought to be protected by complainant is an easement for the conducting of water across the lands of defendant through a certain ditch known as the Nickerson Ditch, in what manner is it contended that the defendant violated this right? It is claimed, solely, that defendant took water out of the Nickerson Ditch, viz.: that it took water out of the conduit through which complainant exercised its right of way for conducting water. The complainant merely contended that it had an easement for conducting water across the lands of the defendant, a claim which as a general proposition was admitted by the defendant. The complainant, however, neither alleged nor attempted to prove the extent of this easement right either in terms of the quantity or in terms of the character of the water it was entitled to conduct across defendant's land. It neither alleged nor attempted to prove that its right to use the conduit, the Nickerson Ditch,

through which it exercised its easement, was exclusive nor that the water taken by defendant out of the conduit on its own land was water of the complainant or water which it was entitled under its easement right to carry across defendant's land. Complainant stood squarely on the proposition that once it was conceded that it possessed an easement right to conduct water across the lands of defendant, the defendant had no right whatever under any circumstance, short of the consent of the complainant, or of a prescriptive right, to take any water out of the conduit through which complainant exercised its right, and this wholly irrespective of the extent or nature of the right.

Complainant's view of the law was adopted by the learned Master, and by the court, which overruled all exceptions and objections taken by the defendant to the Master's report. Since the soundness of this view goes to the very root of the case it is proper that it should be carefully examined.

Complainant's position and that of the court is based entirely upon one sentence of Judge Temple in the case of Silver Creek Company v. Hayes, 113 Cal. 142. That was an action brought to enjoin the defendant from taking water from a certain canal in the possession of the plaintiff and from injuring its banks. The defendant answered and filed a cross-complaint. The allegations of the cross-complaint cannot be ascertained from the opinion. As far as they can be gathered they evidently were to the effect that the defendant was

the owner of land riparian to the creek from which, evidently, the plaintiff was taking water through its ditch. This, however, is only a supposition, because the court does not state the facts. It does not appear whether the defendant was taking water out of the ditch on its own land or elsewhere; whether in fact the ditch extended over the land of the defendant; whether the plaintiff had diverted water to the use of which the defendant was entitled, or what relief was asked for by the cross-complaint. In fact the opinion is so devoid of stated facts that it is impossible to intelligently consider it. In the course of his opinion, however, Judge Temple said:

> "But the fact that defendant had a superior right to the water flowing in the creek would not justify him in destroying the ditch or in taking what water he needed from the ditch at points where it passed over or near his land."

Upon this statement of Judge Temple complainant rests its entire case, contending that where one possesses an easement for conducting water across the lands of another through a designated conduit the mere act of the servient owner in taking water out of the conduit is wrongful and a trespass. Assuming that Judge Temple's statement goes to this extent, it is obvious that the statement cannot be accepted as the deliberate opinion of the Supreme Court of the State of California upon a question fully argued and carefully considered by it. The statement not only was dicta of the most pronounced kind but was made upon a

question of pleading solely, and in a case where, so far as can be ascertained from the reported opinion, it was neither pertinent nor material. It is therefore entitled only to such weight as the doctrine sought to be drawn from it commands as a principle of law or equity.

So far as we are aware there is no such thing known to the law as a general easement right, particularly when the right has its origin in an indefinite grant or is founded on prescription. An easement is a definite, certain, legal right. It must necessarily be so because its enjoyment is a limitation upon the rights of a servient owner in his property, which would otherwise be exercisable to their full extent as of course. For example, one does not speak of a right of way generally over another man's land but a right of way for vehicles, or a right of way to drive cattle, or a right of way to run trains, or a right of way to conduct water, or the like, and a change from one use to another is considered by the law as the exercise of a new right. More particularly a right of way to conduct water, with which we are here concerned, does not mean that one has the right to conduct any quantity of water across the land of a servient owner in any direction or on any portion of the land that he chooses. This is not to say that the servient owner may not by a grant expressly accord such a right to a dominant owner if he so desires, but that such a right can never have its origin in prescription, or even in grant except where the

terms of the grant are so clear as to admit of no other construction.

A right of way to conduct water across the land of another is limited in the first instance to a definite location or way. It is further limited to the particular kind of conduit through which it is exercised.

> "The laying of a pipe on a new line or the substitution of pipe for a ditch or a wooden conduit or for a pipe of a smaller size was therefore not authorized by the mere fact that water had already been conducted across the highway in another manner."
>
> Colegrove v. Hollywood, 151 Cal. 425.

See also

> Weil, Water Rights in the Western States, Third Edition, Section 502, pages 538 et seq.

More than this the easement is not only measured in terms of location and nature and character of conduit, but also, necessarily, in the quantity, or the character (or source) of the water conducted through the conduit. That this is so is shown by the well established rule that a right which arises in prescription cannot extend beyond the actual user made during the prescription period. For example, can one who has been conducting for many years water across the land of another through a ditch of a capacity of one thousand miners' inches,

claim a right of way to the whole capacity of the ditch or to its exclusive use where his maximum user during the period when his right was accruing was one hundred miners' inches? Obviously, to so hold would be according to the dominant owner a right which he had never in fact exercised. This principle is well pointed out in the case of Smith v. Hampshire, 4 Cal. App., page 8, where the court said:

> "This raises the question whether appellant could acquire a prescriptive right to use and maintain the ditch for the specific purpose of conveying a given quantity of water over respondent's land, while respondents at the same time were using a portion of the same ditch for the purpose of conveying a separate distinct quantity to a given point where the checks and side ditch were maintained. We think that under the authorities in this state this question must be answered in the affirmative. Appellant's ripening prescriptive right was limited to his use, measured by the quantity of his water carried through the ditch, and if there was no hostile interference with that use, a permanent prescriptive right would accrue. This, the court found to be the fact, and as respondents have not appealed, this finding must be taken as importing absolute verity. The measure of appellant's right being thus fixed, respondents retained the right to their land, burdened only by the servitude growing out of appellant's easement acquired by prescription. * * * A ditch is no more than a right of way for the passage of water, and it was not essential that the use of the ditch, either by appellants or respondents, should be exclusive in order to confer the sep-

arate and distinct rights found and awarded by the court."

See also

Section 806, Civil Code (Calif.);
Weil, Water Rights, 3rd Ed., Sec. 581;
Abbott v. Pond, 142 Cal. 393;
Bashore v. Mooney, 4 Cal. App. 476.

The same doctrine applies to an easement arising in grant where the grant is indefinite or general in its terms. In the case of Outhank v. L. S. & M. S. R. R. Co., 71 N. Y. 195, the Court of Appeals of New York held that where a grant had been made in general terms to enter upon the lands of the grantor and lay pipe for the purpose of conducting water across them, without specifying the size of the pipe, the right became fixed by user and that the easement could not thereafter be exercised in any other place, or in any other size pipe. In this connection the court said:

> "It is clear then that the right to lay the pipe under plaintiff's grant was fixed by the act of the grantee and the acquiescence of the grantor to the place taken, and it cannot be exercised in any other place across plaintiff's land. But why is not the right also fixed for the same reasons as to the size of the pipe and the quantity of water diverted? I can perceive no reason for confining the operation of this rule to the mere place where the right is to be exercised. There is the same reason for applying it to the entire right granted."

In view of the principles discussed above, an easement for conducting water across the lands of

another may be defined as "a right to conduct water not to exceed a certain quantity or a certain character, in a definite way, and through a specified conduit, across the lands of another". The location of the way, the conduit through which it is exercised, and the quantity or character of the water to which the right attaches are all elements of the easement. If this be true, how can such right be defined without finding and declaring each constituent element? On what theory can the mere taking by a servient owner of water out of the conduit through which the owner of the easement exercises his right constitute a violation of the easement unless the water taken is water which the dominant owner is entitled to carry across the lands of the servient owner? How can a cause of action be either alleged or proven unless the right alleged to have been violated is defined and measured? We confess to a total inability to see how the mere taking of water by the servient owner out of the conduit through which the other exercises its right can be a wrong or a trespass unless the easement extends to the exclusive use of the conduit, or unless the water taken is water which under the easement right he was entitled to conduct across the land.

A mere analysis of the right of complainant, therefore, demonstrates that the principle adopted by the learned Master and the court is wholly untenable. This conclusion is strengthened by two other considerations which have reference particu-

larly to the rights of the servient owner. In the first place water in an artificial conduit until it is actually severed from the soil is real estate. Whatever may be the view in other jurisdictions, and we understand that in a great many of them it is held to be personal property under such circumstances, the Supreme Court of the State of California has consistently held that it is a part of the land.

Stanislaus Co. v. Backman, 152 Cal. 716;
Leavitt v. Lassen Irrigation Co., 157 Cal. 802;
Copeland v. Fairview Land Co., 165 Cal. 148;
Southern Pacific Co. v. Spring Valley Co., 52 Cal. Dec. 273; 159 Pac. 259.

If, therefore, water in a ditch on the servient owner's land is real estate the servient owner as the owner of the fee is prima facie entitled to it, and his act cannot become wrongful unless in some manner and in some way the rights incident to his ownership have been limited and vested in others. How it can be shown that an act lawful in itself is in fact unlawful except by proving that the water taken by the servient owner is water which a dominant owner is entitled to conduct across the land of the servient owner, is not apparent. Certainly, this cannot be shown by establishing the existence of an easement for the passage of water in general terms only. It must in addition show the extent and nature of that right.

In the second place, it is a well established principle of law of easements that a servient owner

may use his land, even that portion over which another claims a right of way, in any manner he chooses, so long as his use is not inconsistent with or in interference of the exercise of the easement. Particularly, and what is more to the point in this connection, he may use a conduit for the carriage of his own water, notwithstanding the fact that another exercises an easement for the passage of water through the identical conduit. This principle is applied and very clearly discussed by the Supreme Court of California in the case of Hoyt v. Hart, 149 Cal., page 722, which we will refer to in more detail hereafter.

From whatever angle, therefore, the question is approached, whether from the nature of the easement right or from the nature of the rights of the servient owner, it is apparent that the doctrine contended for by the complainant and accepted by the lower court cannot possibly be maintained. It is not, and cannot be the law, in view of the foregoing principles, that the mere taking of water by the servient owner out of a conduit through which an easement for the carriage of water is exercised is in itself either wrongful or a trespass. The act of the servient owner itself is the assertion of a right incidental to the ownership of the soil and necessarily rightful, unless in some way his rights on his own land have been limited. Can it possibly be shown that his right is wrongful by simply asserting generally that complainant has an easement for conducting water through the

conduit? As against one who seeks to limit the exercise of the full rights of his ownership, must the servient owner assume the burden of proving his act is lawful? Must he assume the burden of defining the complainant's right and prove the negative fact that he has not violated it? We consistently and earnestly insisted in the lower court, and we do now earnestly insist, that to take such a view is to violate the most fundamental principles of legal or equitable procedure.

The lower court not only adopted this view in determining the burden of proof, but went a great deal further. It held not only that the burden was upon the defendant to justify its act but that as a matter of substantive law and equity there was absolutely no way that it could in fact justify it, short of showing that its act was done by the consent of plaintiff or that it had secured a prescriptive right to use the ditch on its own property.

A brief reference to some of the rulings of the court will serve at once to emphasize the fallacy of the rule adopted and the hardship and injustice worked on the defendant by its application.

A.

The Court Erred in Ruling That Complainant Had Made Out a Prima Facie Case, And That the Burden Was Upon Defendant to Justify Its Act.

On the first day of the trial before the Master, the parties, for the purpose of facilitating the

trial, made certain admissions. These were to the general effect that the right sought to be protected by the plaintiff was an easement for conducting water across the lands of the defendant, a right which as a general proposition was conceded by the defendant. The defendant insisted, however, that the complainant must show something more than the mere existence of such an easement, that he must prove the nature and extent of that easement, and that the act of defendant in taking water out of the ditch was a violation of that right. There is no occasion to refer in detail to the record as to the exact admissions and stipulations entered into by the parties. We will accept the Master's statement of their purport. In the course of his discussion of this ruling found at pages 28 to 30 of the record, he says:

> "I was and am of the opinion that upon the admissions in the pleadings and at the hearing it was shown that plaintiff owned a right of way for water across defendant's land; that defendant had interfered with that right of way by obstructing it and taking water out of it and would continue doing so under a claim of right. This constituted a trespass and threat of continued future trespass making a prima facie case for the plaintiff. It then became incumbent, in my view, upon the defendant to justify the trespass. Defendant's contention that plaintiff must prove the quantity of water covered by his easement will be hereafter more fully discussed."

If we are correct in our view of the law it is obvious that this ruling of the master was erro-

neous. It was not only erroneous but highly prejudicial to the defendant's case. The Master suggests that even if he were in error in making this ruling that the question of the ultimate burden of proof which remained with the plaintiff was not touched. It is not apparent upon what issue the ultimate burden of proof remained with the plaintiff in view of the fact that the Master held as a matter of substantive law that the complainant was not required to measure or define the right he sought to protect either in terms of the quantity or character of the water which he was entitled to conduct across the defendant's land. Merely to lay a foundation for defendant's second and third affirmative defenses the burden was put upon it to limit and define a right, the measure and extent of which it devolved upon the complainant to prove. It was required to prove the negative fact that it had not violated a right which had not been defined or measured. It is too apparent for argument that the ruling affected a great deal more than the mere order of proof, and that it was not and could not be cured by any liberality in permitting defendant to introduce evidence. Any liberality in this connection may have remedied in some measure the hardship caused to the defendant by being forced, contrary to all reasonable expectations, to go forward with production of evidence, but it could not remedy the fact that thereby the burden was placed upon it of proving a fact, proof of which rested primarily upon the com-

plainant. It necessarily deprived the defendant of the benefit of the well established rule that a plaintiff in an action to quiet title must recover on the strength of his own title and not the weakness of his opponents.

22 Cyc., 1369;
Heney v. Percoli, 109 Cal. 253;
McGrath v. Wallace, 116 Cal. 448.

B.

The Court Erred in Holding That the Allegations of Defendant's Second Affirmative Defense Did Not Constitute a Defense to the Action.

The fundamental principle adopted by the lower court was carried to its fullest extent in the ruling and conclusion that the allegations contained in the second affirmative defense set out in defendant's answer did not constitute a legal defense to the action. As we have heretofore pointed out, it was alleged in this defense in substance that the defendant was entitled to the right to use five hundred miners' inches of water flowing in Little Butte Creek to be diverted at the point commonly known as the old Thompson Flat Ditch which had its intake below the intake of the Nickerson Ditch of complainant; that defendant had been using this lower ditch to take the water it had appropriated to its mine; that in 1906 the plaintiff enlarged its ditch and diverted from Little Butte Creek water to the use of which defendant was entitled by

its appropriation; that thereupon defendant took water out of complainant's ditch at a point on its own land sufficient for its needs, not exceeding the amount to which it was entitled under its appropriation; and that this use of the Nickerson Ditch continued from that time until the time of the commencement of the action.

The discussion of the Master with reference to this defense will be found at pages 34 to 39 of the record. In the course of that discussion he says:

> "I know of no authority or no principle of law upon which this claim of recapture can be based. If in 1906 plaintiff diverted water which should have been allowed to flow down Little Butte Creek to defendant's dam, defendant's remedy was either an action for damages or an injunction requiring plaintiff to permit the water to flow in Little Butte Creek to defendant's dam as theretofore. The water itself did not become the subject of property, until restrained by plaintiff's diverting works and ditch. When it passed into plaintiff's ditch it became plaintiff's private property to which defendant had no right without making compensation. It is difficult to see in what way the commission of a tort by plaintiff would justify defendant in committing a tort against plaintiff by trespassing upon its right of way and taking the water it had emptied. There seems no good reason why if plaintiff prevented the water reaching defendant's ditch, defendant gained thereby a right to have the water delivered on his land by the plaintiff's ditch without charge and without any burden of maintenance and operation of the ditch to himself. The case of Silver Creek v. Hayes,

above cited, is an authority against defendant's position."

Accordingly, the Master held that the facts set out in the defense were wholly immaterial and therefore declined to find as to the respective rights of the plaintiff and defendant in and to the waters of Little Butte Creek or to the Nickerson Ditch (Assignments XII, XIX), and whether the Nickerson Ditch was enlarged in 1907 as alleged, or whether the plaintiff diverted into its ditch any of the water of Little Butte Creek to which the defendant was entitled (Assignments XVII, XVIII).

In this ruling the lower court carried the principle adopted by it to a somewhat startling, even if logical conclusion. Conceivably, we may be mistaken in the view that as a matter of evidence and procedure the burden was upon the complainant to establish and define his right and the violation thereof by the defendant. Assuming that we are mistaken in this connection, and that the burden of justifying its act was upon the defendant, did not the facts alleged show such a justification? Whatever may have been the extent and character of the easement right claimed by the complainant, whether it was confined as contended by the defendant to the water emptied into Little Butte Creek by the Snow Ditch, or whether it extended to some quantity or portion of the waters of Little Butte Creek, it certainly did not, nor could it, extend to water to the use of which the defendant was entitled either as appropriator or as riparian owner. Ac-

cordingly, since the allegations are only to the effect that defendant took water out of the conduit which had been diverted from its use by the plaintiff, not exceeding the amount that it was entitled to under its appropriation, such act could not possibly violate any right possessed by the complainant. The ruling, therefore, is supportable only on the theory that the mere existence of an easement to conduct water across the lands of another through a designated conduit absolutely precludes the servient owner from taking any water out of that conduit irrespective of the extent of the easement right. This position, as we have heretofore pointed out in detail, cannot be maintained.

If it were assumed, in any possible view of the case, that the doctrine adopted by the court would under any circumstances, be acceptable to a court of law, can it possibly be invoked in a court of equity by a wrongdoer to sanction and perpetuate its wrong? Why should the defendant be required to go to the expense and delay of an action to enjoin the complainant from diverting water to the use of which it is entitled, when its remedy, one that can be availed of forthwith and without any breach of peace, lies immediately at its hand? Even the common law approved of self remedy where that could be availed of without breach of peace or trespass. Among such remedies by the mere act of the party, Blackstone enumerates self-defense, recaption or reprisal, re-entry of land, abatement of

nuisances, and distress for rent. With reference to recaption or reprisal particularly he says:

> "Recaption or reprisal is another species of remedy by the mere act of the party injured. This happens when one party hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child or servant, in which case the owner of the goods, and the husband, parent or master may lawfully claim and retake them wherever he happens to find them so that it be not in a riotous manner or attended with a breach of peace. If therefore he can so contrive it as to regain possession of his property without force the law favors and will justify the proceeding."
>
> Blackstone, Book 3, page 5.

If this is the view of the common law with reference to goods and chattels, how much more should it be favored by a court of equity under the circumstances disclosed by the allegations of defendant's answer. Water may not be goods and chattels in a legal or technical sense, but the right to the use of water is as valuable and entitled to as much protection as a right to goods. No good reason appears why equity should not favor a self-remedy with reference to rights to water as much as to other property rights.

With all due respect to the Master and the lower court, we submit that the reasons recited for holding that the act of defendant even under these circumstances is wrongful is neither persuasive nor convincing. It is true, of course, that if complain-

ant diverted out of Little Butte Creek water to the use of which defendant was entitled under its appropriation it had a remedy by action for damages or for an injunction. This circumstance, however, in itself is no reason for precluding defendant from availing itself of a self remedy immediately available, to which on elementary principles of equity it was entitled to resort.

The suggestion that water is not the subject of property until actually taken into possession, and that when it was taken into possession by complainant's ditch it became complainant's private property, is misleading and has no bearing on the fundamental equities involved. It may be true that water flowing in a stream does not become private property until taken into possession, but it does not follow that when it is taken into possession in violation of the rights of others that it thereby becomes private property in the sense that the one entitled to its use is precluded from retaking it where he can do so without trespass or without a breach of peace (see Stanislaus Co. v. Backman, 152 Cal. 716). Furthermore, such a conclusion wholly ignores the California doctrine that water until it is absolutely severed from the soil is a part of the realty. When the one who has diverted water to the use of which another is entitled, deliberately conducts and brings that water onto the land of the one whose rights have been violated, it necessarily becomes his property as much as if another had without right erected improvements of buildings on his property.

The suggestions of the Master, therefore, are not pertinent to nor determinative of the question involved.

It was not the contention of the defendant, as intimated in the last sentence but one of the above quotation from the opinion of the Master, that it gained a right to have the water delivered on its land by the complainant's ditch by reason of the fact that complainant had prevented the water reaching defendant's ditch. It contended only that if the complainant actually diverted water to the use of which defendant was entitled and thereafter brought it across its property in a conduit, it was entitled to take it on its land *while* the complainant was actually so diverting the water and *while* the water was crossing defendant's property. The further suggestion that defendant would be thus availing itself of the use of complainant's ditch without charge and without any burden of the maintenance of the ditch to itself has no bearing upon the fundamental principles involved. If in any possible view of the case the complainant after violating the rights of the defendant and while it is actually continuing the wrong can require contribution to the upkeep of the ditch, its rights in this connection can adequately be secured to it by the decree.

We earnestly submit that the ruling of the court on this defense cannot be supported on any legal rule and certainly on no principle of equity.

C.

The Court Erred in Holding and Concluding That the Third Affirmative Defense of the Defendant Was Invalid in Law.

In its third affirmative defense the defendant alleged that it had at no time used the Nickerson Ditch in any manner inconsistent with the enjoyment by complainant of any easement right it may have had to conduct water through it. Defendant contended that if the burden was upon it to justify its act, and if it could not be justified on the broad principles of equity, it could at least be justified on one well established principle pertaining to the law of easements.

It is a principle so well established as to require no citations of authority that a servient owner may use land over which a right of way is exercised in any manner which does not materially impair or unreasonably interfere with the enjoyment of the easement right (14 Cyc. 1208 and cases cited). In considering this defense the learned Master in his report says:

> "The third defense in effect is, that defendant is justified in taking water from plaintiff's ditch provided such use is not 'inconsistent with the enjoyment of said easement possessed by plaintiff'. Defendant's position is that plaintiff must prove in definite measure the amount of water which it has an easement to conduct over defendant's land. Defendant's position must be that if there is in the ditch any water over and above this amount defendant may take it out without compensation. If such a rule

> prevailed ditch owners would be constantly harassed by servient owners taking water from their ditches under claim of right, and putting them upon proof of the quantity which they were entitled to conduct. Since the amount of water passing through a ditch differs as between seasons, and often between hours of the same day, the practical injustice of such a doctrine seems obvious. In fairness to defendant, however, it must be stated that its position in this case does not go thus far. Its position is that where it has the right to divert water from a stream and this right has been destroyed by the action of the upper ditch owner it may use the upper ditch jointly for the passage of its water with the water of the upper owner, on the theory that such owner will get only the water to which he was rightfully entitled."

It may be noted in passing that the Master's suggestion that if the complainant was required to measure his easement right and define the amount of water which it has an easement to conduct over defendant's land, ditch owners would be constantly harassed by servient owners taking water from their ditches under claim of right and putting them upon proof of the quantity which they were entitled to conduct, is of no materiality. The same reasoning is equally applicable to cases of controversy between riparian owners and appropriators, and between appropriators of the waters of a stream, and overlooks the obvious answer that as soon as a right is infringed an action lies to quiet title and admeasure the right and to secure a declaratory injunction. Furthermore, it ignores the fact that the right claimed is a limitation on the right of

ownership of the owner of the fee, and, therefore, if there is any equity in the situation it is in favor of the owner of the fee rather than the ditch owner.

Defendant's position in this defense is primarily based upon the decision of the Supreme Court of the State of California in the case of Hoyt v. Hart, 149 Cal. 722. That was an action brought by the plaintiff for an injunction to restrain the defendant from interfering with the flow of waters claimed by the plaintiff in a certain ditch on defendant's land. It appears from the facts recited in the opinion that the plaintiff and defendant were owners of adjoining tracts of land in Siskiyou County, plaintiff's holding lying to the west of defendant's; that on the easterly side of defendant's land there was an irrigation ditch and that each claimed an interest in the waters flowing therein. Plaintiff alleged that it was the owner of two hundred inches of the waters flowing in the ditch and that it had a prescriptive right to have these waters conducted through the ditch over the land of the defendant. The defendant in its answer denied that the plaintiff had any interest in the waters of the ditch other than one-eighth, and that she had never received her measure of the water through any defined channel or water course over the defendant's land. In a cross-complaint the defendant asked that the respective rights in the waters of the ditch be determined and that the plaintiff be required to conduct her waters by a route to be designated by the court outside of de-

fendant's irrigated premises. In her answer to this cross-complaint plaintiff set out a prior judgment by which it was determined that the plaintiff was the owner of a ditch and water way across the lands of the defendant for the purpose of conveying her waters.

The court found that the plaintiff owned an undivided one-eighth interest of the waters flowing in the ditch, which undivided one-eighth at no time exceeded seventy-five inches; that she had conducted it for many years through the ditch over defendant's land in a described course. The decree found that the plaintiff had an easement over the premises of the defendant as described in the findings; declared that the defendant had the right to conduct his waters through the ditch jointly with plaintiff and enjoined the defendant "from in any way or manner interfering with or diminishing the flow of water to which the plaintiff, Elizabeth Hoyt, is at any time entitled to have received as her proportionate share of the waters of said Burgess Ditch", and permitted the defendant to use the ditch jointly with plaintiff provided, however, that he at no time prevent the one-eighth of said Burgess Ditch from flowing through said ditch. The plaintiff appealed from this judgment contending that the decree in authorizing the defendant to use the ditch running over his land in common with the plaintiff deprived the plaintiff of the fixed and definite easement claimed by her. Concerning this claim the Supreme Court said:

"The appellant's principal objection is directed against the provisions of the decree which declare her right to an easement across defendant's land. *It is claimed that the decree, in authorizing the defendant to use the ditches running over his land in common with the plaintiff, deprives the plaintiff of the fixed and definite easement claimed by her.* But we fail to see that these provisions of the decree fall short in any degree of securing to the appellant her full rights. It having been found that the water to which she is entitled is only one-eighth of that flowing in the Burgess ditch, and that this one-eighth at no time exceeds seventy-five inches, she is awarded by the decree a right to carry her share of the water over the defendant's land through the ditches and waterways in which she has claimed a right to carry it. It is true that defendant is also permitted to use these waterways, but his use can never, under the terms of the decree, infringe upon her rights. He is restrained from reducing these ditches so that their carrying capacity will be less than seventy-five inches, or from diminishing the flow of waters to which plaintiff is entitled, and his right to use the ditches is expressly made subject to the proviso that he at no time prevents plaintiff's one-eighth of the waters of the Burgess ditch from flowing through the connecting ditches. There is no inconsistency between the portion of the decree declaring that plaintiff has an easement in these ditches and that portion which grants to defendant the right to use the ditches jointly with plaintiff for the purpose of carrying his waters. The easement is a right to use the lands of the defendant for conducting her waters to her lands. It can co-exist with a right in the defendant or any one else to use the same waterways, so long as such use does not restrict or interfere with the right owned by

> the plaintiff. It would not be claimed that merely because A has a right of way over B's land, B cannot under any circumstances use the portion of his land affected by the easement in a manner which does not infringe upon the exercise of such easement. It is well settled, as a general proposition, that the owner of the servient estate may use his property in any manner and for any purpose consistent with the enjoyment of the easement. 'Thus in a case of a way the owner of the servient estate may use the land over which it passes in any manner which does not materially impair or unreasonably interfere with its use as a way. He may himself use it as a way * * * unless the rights of the owner of the easement are exclusive' (14 Cyc. 1208, and cases cited). In the case at bar there is no allegation that the plaintiff's right was exclusive."

With reference to the plea of a prior judgment set out by plaintiff in answer to the cross-complaint of the defendant, the court said:

> "Plaintiff relied upon this judgment merely for the purpose of establishing her right to an easement for conveying her water across defendant's land. She has been awarded the easement claimed, and would be entitled to no greater rights if the court had expressly found that such easement had been established in her favor by a prior judgment. As we have seen, plaintiff's ownership of an easement over defendant's land is in no degree inconsistent with the use by defendant of the servient tenement, so long as such use is subordinate to the easement and does not restrict or limit its exercise. The former judgment declaring plaintiff's title to such easement did not purport to determine whether or not defendant had a right to use the ditches. It merely determined that

> plaintiff had a certain right in them. The right is secured to her by the present decree. A finding that the former judgment was in force would not have entitled her to any greater relief than she received. The absence of such finding cannot therefore affect the judgment now complained of. (Gould v. Adams, 108 Cal. 365, 41 Pac. 408; Blochman v. Spreckels, 135 Cal. 662, 67 Pac. 1060.) In plaintiff's plea of former judgment the allegation is that it had been adjudicated that she was the owner of a 'ditch and waterway' across the lands of defendant for the purpose of conveying waters. In the foregoing discussion we have treated this allegation as meaning no more than that she owned an easement or right to carry waters over his lands through a ditch or waterway, and such we think is the proper construction of the language quoted."

A careful reading of this decision, apart from its pertinency to the third defense, demonstrates the soundness of defendant's position on the general principles applicable to this controversy. The Supreme Court of California in this decision most certainly holds that an easement for the conducting of water across the lands of another in a certain conduit is a definite, measurable right. The position of the complainant and of the lower court that the mere existence of an easement right, irrespective of its character or extent, precludes the servient owner from taking any water out of the conduit through which it is exercised, is absolutely inconsistent with the doctrine announced in this case. How, possibly, can a servient owner use a ditch across his land for conducting his own water,

providing it does not interfere with the exercise of the easement right, if by the mere taking of water out of the ditch on his own land he commits a trespass!

In commenting on this decision the learned Master says:

> "Judge Sloss in writing the opinion, and the Supreme Court in adopting it, did not contend, and certainly did not mean to be understood as saying if defendant here had no joint right in the easement he could nevertheless use it jointly with plaintiff without bearing any of the expense."

It is not entirely clear just what is meant by this language. If the servient owner has the right to use the ditch for the purpose of carrying his own water, providing it does not interfere with the easement of the complainant, his mere exercise of that right gives rise to a joint use of the ditch. The only other meaning of which the statement is susceptible is that before a servient owner can use a conduit through which another exercises an easement he must show that some of the water flowing in said ditch belongs to him. It cannot be assumed, however, that this is meant since the Master concludes that the respective rights of the waters in Little Butte Creek and of the waters flowing in the ditch are immaterial. The exact grounds of distinction are not therefore apparent.

The Master, further commenting upon the case with particular reference to the present controversy, says:

"And, furthermore, if the case cited is to be considered as authority for the proposition that defendant may use plaintiff's land ditch for the passage of defendant's water, provided room enough is left for the passage of plaintiff's water, it must necessarily be limited in its operation to that portion of the ditch on defendant's land. Here, however, the defendant claims the right to run the water which it claims not only through the plaintiff's ditch in defendant's land, but through the upper portion of plaintiff's ditch between the intake and defendant's land, which runs over land not owned by defendant at all. * * *

"None of the cases cited therefore seem to justify defendant in its claim of right to divert this water through plaintiff's ditch and to take it out as it passes its land. Nor do they imply the corollary proposition that the owner of a right of way for water must in a suit to prevent trespass upon it prove his right to the water itself, or must measure the extent of his right of way in inches as against a trespasser."

The defendant did not, and does not claim, that it had the right to itself change the point of diversion from the head dam of its ditch on Little Butte Creek to the intake of the Nickerson Ditch and carry its water through the Nickerson Ditch over the lands not owned by it and on to its own land, under the doctrine of the Hoyt case or upon any other principle. It contended merely that when the complainant diverted the water to the use of which it was entitled flowing in Little Butte Creek into the Nickerson Ditch, and in violation of the rights of defendant conducted the water through its ditch across the lands of others and from thence to

the lands of defendant, defendant was entitled to adopt the act of the complainant as its own act done with the acquiescence and the consent of the complainant, and under these circumstances to justify its act on the doctrine of the Hoyt case. Defendant's position extends no further than that it could take the water out of a ditch on its land *so long and while* the complainant was actually diverting it and taking it across its land. It claimed no right to do so if the complainant ceased diverting the water into the ditch.

We submit that on elementary equitable principles the complainant is in no position to urge that the doctrine of the Hoyt case is inapplicable because the ditch from its intake to the Bader spillway does not extend entirely over the lands of defendant.

D.

The Court Erred in Failing to Find in the Decree the Nature And Extent of Complainant's Right.

As we have heretofore pointed out, the court in its decree found that the complainant was "the owner of that certain ditch situated in the County of Butte, State of California, known as the "Nickerson Ditch"; that defendant had no right, title or interest in or to said "Nickerson Ditch" or any part thereof, nor any right to enter upon said "ditch" nor interfere therewith, nor disturb complainant's possession thereof, nor any right (excepting upon obtaining complainant's permission and paying the

legal rates therefor) to divert or take any of the water which now is, or may hereafter be, in said "ditch", and that a writ of permanent injunction issue against said defendant enjoining and restraining it from in any form or manner, directly or indirectly, asserting any right, title, interest or claim in or to said "ditch", or any part thereof, or from entering upon or in any way interfering with said "ditch" or any part thereof, etc., or from diverting or taking, or causing to be taken or diverted, any of the water which now is, or may hereafter be, in said ditch.

So far as this decree finds that the complainant is the owner of the Nickerson Ditch, and that defendant has no right, title or interest therein, it is perhaps without great prejudice to the defendant. As was pointed out in the Hoyt case, a decree or finding in this language means no more than that complainant owns an easement or right to carry water over defendant's land through a ditch or water way. But the decree goes a great deal further than this. It enjoins the defendant, among other things, from diverting or taking, or causing to be diverted or taken, water out of the ditch, in any circumstances, except upon payment of compensation to the complainant at the usual rates. This is tantamount to a decree that complainant's easement extends to the full capacity of the conduit and that it is entitled to its exclusive use.

It is defendant's contention that if it is wholly mistaken in its view as to the law, and if the second

and third affirmative defense of defendant's answer do not constitute a defense to the action or were not substantiated by the facts adduced in evidence, nevertheless the decree in its present form cannot be sustained.

If the mere exercise of an easement right across the land of the servient owner through a designated conduit precludes the servient owner from taking water out of the ditch under any circumstances, short of the consent of the proprietor of the easement or of a prescriptive right so to do, then a decree finding simply that complainant has an easement right, without fixing or measuring it, would justify the issuing of an injunction preventing the diversion of the water. This proposition, as we have endeavored to point out cannot be maintained.

The only other theory upon which the decree can be supported is that the complainant's easement right extends to the full capacity of the ditch and to its exclusive use. Apart from the fact that it is obvious that the court neither found nor determined this fact, but on the contrary based its decree on the assumed doctrine of the Silver Creek case, there was neither allegation nor proof that complainant's right extended to the full capacity of the ditch or that it was entitled to its exclusive use.

We submit that in an action to quiet title to an easement and to enjoin the act of a servient owner which, it is alleged, interferes and obstructs the enjoyment of the easement right, the decree must fix and determine the right; and that in the absence

of such a finding a judgment shows no possible foundation for an injunction preventing the owner of the land from using the conduit through which the easement is exercised. As the decree stands, the court, without any allegation or proof of the nature or extent of complainant's right, and without finding or decreeing that it extends to the full capacity of the ditch, or its use of the ditch is exclusive, and without so much as determining and describing the ditch by dimensions or course, deprives defendant of any possible use that it might make of the ditch. This, in effect, is depriving defendant of its property without due process and without compensation.

II.

THE COURT ERRED IN HOLDING AND CONCLUDING THAT DEFENDANT DID NOT HAVE A PRESCRIPTIVE RIGHT TO USE THE NICKERSON DITCH AND TAKE WATER THEREFROM.

By its sixth affirmative defense, defendant set forth that it had secured a prescriptive right to use the Nickerson Ditch and to take water therefrom. It was defendant's contention that if the burden was upon it to justify its acts in taking water, and if those acts could not be justified on any other legal or equitable principle, that at any rate it had been in the quiet, open and continuous possession of the right to conduct its water through the ditch and to take water from the ditch, holding and claiming said right adversely to all persons under a claim

of legal right for more than five years before the commencement of the action and accordingly had secured a prescriptive right so to do.

The discussion of this defense is contained in the report of the learned Master at pages 57 to 60 of the transcript. He finds that the user of the defendant of the water out of the Nickerson Ditch was open, continuous and adverse after 1909, but finds and concludes that prior to that date, viz., during the period from 1906 to 1909, (1) the water was taken only occasionally and not in the manner to raise a foundation for prescription and (2) the use was not open, but on the contrary, surreptitious and without the knowledge of complainant. He further finds that (3) in any event the user was several times interrupted by the complainant even subsequent to the year 1909. Each of these findings and conclusions (for they are as much conclusions of law as findings of fact) were excepted to by defendant and have been here assigned as errors (supra).

1. We have carefully re-read the record in this case and we submit that there is no substantial conflict of testimony on the fact that commencing with 1906, at which date the defendant contended the complainant diverted the water out of Little Butte Creek, it used the water from the Nickerson Ditch continuously as its needs required. Mr. Mowry, the superintendent and manager of defendant company, testified that he has been using water at the mine continuously since that date and has made no pay-

ments whatever to complainant; that he has used the water in washing for two or three hours every day when working, and when not washing, has used the water to run through the flume, clean out the debris, and keep the sluices tight (137, 138). W. C. Bader, a witness produced by defendant, testified that he worked at the defendant's mine off and on since the year 1901 or 2, up to within four or five months prior to the date of the trial, both summer and winter; that during all the time he was thus working, the defendant secured its water out of the Nickerson Ditch; that while he was working at the mine it was his special duty to turn the water on in the morning from the ditch when he went to work and to turn it off at night (333). The witness E. H. Bickford testified that he worked on the Nickerson Ditch for complainant company in the years 1908 and 1909; that at that time the defendant company took water out of the Nickerson Ditch to the Bader Mine, and that he notified Mr. Durbrow, the superintendent of defendant company, of that fact (368, 381). The witness C. W. Bader, produced by complainant, testified that he had been working at defendant's mine since the year 1900, or thereabouts, and that since the year 1906 water had been used continuously at the Bader Mine out of the Nickerson Ditch (241 to 246).

In addition to the foregoing direct evidence of the user of the water at the Bader Mine from the years 1906 to 1909 defendant put in evidence its pay-rolls, pay-checks, etc. (Exhibit 342-350), which

showed that the Bader Mine had been operated practically continuously from February, 1906, to December, 1912, employing all the way from three to eight men. It is without controversy that after 1906 defendant's ditch, heading in Little Butte Creek, fell into decay, and that the only source from which water could be procured for the operation of the mine was from the Nickerson Ditch. This fact, in connection with the fact that the mine was a placer mine and could not be operated without water, is a silent, though eloquent, corroboration of the testimony of the witnesses.

The Master evidently reaches his conclusion that the user was not continuous solely on the testimony of the witness Durbrow, the substance of which he recites in his report. His testimony was to the effect that he was the manager of the Oroville Water Company, and of its successor, between 1903 and 1908; that if any water was used by defendant between 1906 and 1908, it was without his knowledge; that if it was taken during the summer when all the water was needed for irrigation he would have learned of its diversion either from the ditch tender or from the complaint of irrigators. He did not testify that he personally was on the ditch frequently and he admitted that if the water had been taken other than in the limited irrigation season, it possibly would not have been called to his attention. We submit that this conclusion of the witness, for it is nothing more than a conclusion and an inference, cannot, in view of

the direct evidence to the contrary, raise a substantial conflict as to the user of the defendant company of water from the Nickerson Ditch during the years after 1906.

In this connection it may be pointed out that even if the user was occasional it does not follow that it was not continuous in a legal sense. If the water was used by defendant company whenever it needed it, though that may not have been frequently, the use in legal contemplation was continuous. (Wiel, Water Rights in the Western States, 3rd edition, Sec. 583, and cases cited.) The Master did not find that the water was not used on all occasions when required by defendant company.

2. The finding that the user during this period was also surreptitious and without the knowledge of complainant, has as little support in the evidence. The spillway of defendant in the Nickerson Ditch is an extensive structure, as are the flumes and pipes leading therefrom. If, therefore, the defendant used the water continuously from 1906 to 1908, as its needs required, it is obvious that it could not have been surreptitious. How the defendant company could have conducted its mining operations during those three years, working, as the pay-rolls show, four or five men at the mine, by the surreptitious use of water, is not apparent. If the water was used from its spillway as defendant required it, the water running from morning to evening (supra), this fact alone proved knowledge on the part of complainant. This is entirely apart from the tes-

timony of Bickford, the ditch superintendent, that he knew of the user and reported it to Durbrow (Guernsey v. Antelope, 6 Cal. App. 392; Defrize v. Quint, 94 Cal. 635; Silver v. Hawn, 10 Cal. App. 544; Montecito v. Santa Barbara, 144 Cal. 597).

The learned Master arrives at his conclusion that the use during these years was surreptitious in part because of the testimony of the witness Durbrow, to which we have just referred, and in part because of an incident testified to by the witnesses Biek and Lincoln. As we have pointed out, the testimony of Durbrow is a pure conclusion, and of no particular weight in this connection. The witnesses Biek and Lincoln testified that in April, 1909, they went over the ditch with Bickford, who was at that time terminating his employment with the company, and was showing Biek over the plant as his successor. It appears that when they reached the spillway of defendant they found the gate open and one Ed Bishop in charge. Biek testified that Bickford talked with Bishop and that Bishop closed the gate down. This witness stated his version of the incident in this way:

> "At the time we were there on April 19th, 1909, Mr. Bishop closed the gate down. Mr. Bickford and he talked about it and he just closed it down. I don't think anybody asked him. I do not know whether he stayed there and raised and lowered the gate. He said that he was told to turn it on for fifteen or twenty minutes at a time and then close it down. We went on down the ditch and did not return any more. We saw him leave the place going

> down to the mine. Neither Mr. Bickford, myself nor Mr. Lincoln went to the Bader Mine at that time, nor did we see Mr. Mowry or any officer of the Bader Mining Company. Mr. Bickford did all the talking. I don't know that he told him to leave the gate down. He asked him if he did not know he was doing wrong by doing that. He really gave no orders at all that I can remember of. He told us that Mr. Mowry instructed him to open the gate for fifteen or twenty minues, and then close it down for half an hour before he opened it again, so that the water people would not miss the water'' (222).

The witness Lincoln, referring to the same incident, also stated that Mr. Bickford had done the talking with Mr. Bishop. He testified:

> "I don't remember anything that was said except that Mr. Bickford asked him how long he had kept the gate open and he said he had orders to keep it open fifteen or twenty minutes and then shut it down for at least half an hour. That is all I remember about being said. He closed the gate there before we left'' (228).

At another place in his testimony he said:

> "At the time I was on the ditch in April or May, 1909, the time when Mr. Ed Bishop was there, Mr. Bishop did not state to me nor in my hearing the reason why he was manipulating the gate'' (234).

Mr. Bickford, in his testimony, does not refer to the incident.

Mr. Mowry testified that he had, as a matter of fact, on that occasion, instructed Bishop to open

and shut the gate at the spillway so as to leave it open for twenty or thirty minutes and then shut it down again. He testified that these instructions were occasioned by the fact that there were some sixty feet of debris in the mine and that they were driving a new tunnel; and that the water was needed to sluice out the debris and rock after the blasting. In order that the men could have a chance to break up the rocks to get ready for the sluicing he instructed Bishop to close the gate for about twenty minutes at a time and then open it again, and turn the water all down, and that they kept that up all day (353).

It will be noted that the Master reaches his conclusion that this incident is proof that the Bader mine was taking the water surreptitiously on the testimony of Biek that Bishop said that Mowry had given these instructions "so that the water people would not miss it". Lincoln, who was also a witness for complainant, and present at the time, testified that Bishop did not state any reason for his instructions. In view of the fact that there is not one scrap of evidence in the record other than this one incident upon which any finding that there had been a surreptitious use of the water could possibly be based, it is submitted that this testimony does not justify the finding that on that occasion the defendant company was taking the water clandestinely. It certainly is not evidence of a habit or custom of doing so.

In this connection, we desire to call the court's attention to the Master's ruling excluding and rejecting the testimony of the witness William J. Newman (386). He testified that from the year 1903 he had made many visits to the Bader Mine, both summer and winter; that since 1906 the mine had been getting its water out of the Nickerson Ditch. He then was asked whether on the occasions on which he was there, the gate from the Nickerson Ditch was open and the water running down to the mine. An objection to this question was sustained by the Master, and defendant was precluded from showing by the witness that on the occasion of every visit he made he had seen the gate open and the water running to the mine. In view of the fact that the Master finds both that the use during the years from 1906 to 1909 was not continuous and was surreptitious, it is obvious that this ruling was prejudicial.

3. The Master further finds, however, that even if the use after 1906 was continuous and open, it was, nevertheless, interrupted several times by complainant and its predecessors in interest. The acts which the Master construes as interruptions of the user by defendant are not enumerated in his report, and it is therefore impossible to determine whether his conclusion is one of law or of fact.

The record shows that on no occasion when the Bader spillway was found open by the company's representatives and was closed by them, was the fact that the gate had been closed by complainant

brought home to the knowledge of defendant. Not the least remarkable circumstance in this case is the careful manner in which the officers and employees of the complainant and its predecessor in interest refrained from going to the mine after they had closed the gates and calling the attention of defendant to the fact that complainant had closed it (Biek, 223, 224; H. H. Lincoln, 234; A. A. Davis, 286).

Unless these acts were brought to the knowledge of defendant as acts of complainant, they obviously did not constitute an interruption of the user in any legal sense (Bratin v. Conn, 91 Pac. 458).

Mere notices posted on the spillway by complainant forbidding the taking of the water, or verbal protests, could not in any view of the case constitute sufficient interruption as to prevent the accruing of the prescriptive right (Coxe v. Clough, 70 Cal. 345; Oregon v. Allen, 69 Pac. 455).

It is worthy of note with reference to this question of interruption, that the employees of plaintiff, according to their own testimony, never attempted until 1912, when the five year period had run, to take out the cross-gate in the Nickerson Ditch (or the appliance by which the water could be diverted (277, 278, 288, 334)), or to block up or at any time to take out the spillway or interfere with defendant's flume leading from the ditch.

We submit that a careful reading of the record shows without question that from the year 1906 the defendant company openly, continuously and

adversely, under a claim of right and with the full knowledge of the complainant, took water out of the Nickerson Ditch at a point on its land as it needed it, and that by reason of these facts alone, apart from any other question in the case, its acts were justified under a claim of prescriptive right.

III.

THE COURT ERRED IN HOLDING THAT THE COMPLAINANT WAS NOT GUILTY OF LACHES OR OF INEQUITABLE CONDUCT.

The defendant contends that irrespective of every other question involved in this case the complainant was not entitled to the equitable relief prayed for in that it had slept on its rights and was in an inequitable position.

It is a well established principle that irrespective of any Statute of Limitations, laches, in seeking a remedy in equity, may prevent the plaintiff from securing the relief prayed for (Wiel, Water Rights in the Western States, Vol. 1, Sec. 644).

> "A party seeking equitable relief against the interference with an easement must be prompt in doing so. Any long delay not satisfactorily explained or accounted for will bar his right to such relief."
>
> 14 Cyc. 1219, and cases cited.

This is particularly true where, by reason of facts accruing by reason of the long delay of complainant to enforce his remedy, equitable relief cannot be afforded without doing an injustice.

The Master states that there has been no change in the position of the parties in that the defendant was in the same position after 1906 as it was before, inasmuch as prior to that time no water was used out of its ditch from Little Butte Creek in the summer time. As we have heretofore pointed out, the defendant pleaded and contended that in 1906 the complainant had diverted all the water out of Little Butte Creek away from its ditch, and that its ditch had by reason thereof fallen into decay and ruin. If it be true that complainant diverted the water of defendant in that year, that thereafter defendant took the water while it was actually being conducted across its land and has continued to do so ever since it would seem, if there is any force whatever in equitable principles, that the complainant, after permitting it to do so for such a length of time, thereby losing any right that it may have had to enjoin the diversion of the water, has been guilty of laches and has no standing in a court of equity. And this is true even if the user by defendant of water out of the Nickerson Ditch, because of interruptions, or otherwise, was not of a character to raise a prescriptive right. For this reason, if for no other, the failure to find on the water rights in Little Butte Creek or on the question of divertion was erroneous and prejudicial.

CONCLUSION.

One cannot read the record in this case carefully without being impressed with the circumstance that

the complainant at no time until the elapse of five years after the time when defendant claimed it diverted defendant's water from Little Butte Creek, made any effort apart from a few verbal protests, and an occasional shutting of defendant's spillway, to prevent defendant from taking water out of the Nickerson Ditch. We think it is a fair inference that the complainant deliberately permitted the five year period to elapse after its diversion of defendant's water, at the expiration of which time it took out defendant's spillway and commenced this action. In so doing it was its purpose, if possible, to prevent defendant from taking further water on the assumed precedent of the Silver Creek case, and at the same time raise the bar of the Statute of Limitations to any attempt on the part of defendant to prevent further diversion of its water from Little Butte Creek. This purpose will be accomplished if the decree is permitted to stand.

We submit that the decree is erroneous and should be reversed.

Dated, San Francisco,
May 16, 1917.

Respectfully submitted,
R. H. Cross,
Arthur H. Brandt,
Attorneys for Appellant.